



STATE OF INDIANA

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January 14, 2011

Mr. Jay Meisenhelder
The Law Offices of Lawrence M. Reuben
136 E. Market St., Suite 200
Indianapolis, IN 46204

*Re: Informal Inquiry 10-INF-55; Investigatory Records of the Kokomo
Police Department*

Dear Mr. Meisenhelder:

This advisory opinion is in response to your informal inquiry regarding the Kokomo Police Department's ("KPD") denial of your request for access to public records under the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion. My opinion is based on applicable provisions of the APRA.

Your inquiry relates to an incident that occurred on July 6, 2010, in Kokomo, Indiana. You claim that a number of police officers stopped your client, Jacqueline Valentino, while she was driving her vehicle, and forced her out of her car at gunpoint. The officers then handcuffed her and placed her in a squad car for approximately 45 minutes. You state that the KPD was not engaged in the investigation of a crime at that time. Rather, the officers stopped Ms. Valentino at the request of deputies from the Licking County (Ohio) Sheriff's Department ("LCSD"), who were investigating a crime that Ms. Valentino's husband allegedly committed in Ohio. The LCSD deputies were on the scene in Kokomo on July 6th and, according to your inquiry, conducted the actual investigation. The officers later required Ms. Valentino to accompany KPD officers to KPD's headquarters, where she was questioned by the LCSD officers, and "to a potential rendezvous with her husband," before being released at approximately 1:00 the next morning.

You submitted a records request to the KPD seeking records related to the incident. In response, KPD informed you that it was denying your request because it considered the records "investigatory records" under the APRA. You argue that the withheld records are not investigatory records because KPD was not the agency conducting the criminal investigation. You also argue that the KPD should release the information specified in section 5 of the APRA regarding arrested or summoned individuals under subsection 5(a), as well as information contained in the KPD's daily

log under subsection 5(c). Finally, you argue that KPD abused its discretion by withholding the requested records in this case because Ms. Valentino intends to file a lawsuit against the officers involved in the incident and needs to obtain their names prior to doing so. You also note the fact that if Ms. Valentino files a lawsuit regarding these allegations, the requested information will likely be available to her at that time under the applicable rules of discovery.

City of Kokomo Corporation Counsel Lawrence McCormack responded to your inquiry on behalf of the KPD. He maintains that the requested records are investigatory records because the KPD was, in fact, investigating a crime allegedly committed by Ms. Valentino's husband. Mr. McCormack claims that the KPD was working in concert with the LCSD on the investigation, so any records compiled by the KPD during the course of that investigation are exempt from disclosure under the investigatory records exception to the APRA. With regard to your assertion that records should be released under subsection 5(a), Mr. McCormack avers that Ms. Valentino was never arrested by the KPD. As to your argument regarding subsection 5(c), Mr. McCormack states that "Ms. Valentino cannot rely on 5-14-3-5(c) because the information requested is an "investigatory record" governed by 5-14-3-4." Finally, Mr. McCormack denies your claim that the KPD has abused its discretion. He argues that the KPD opted to withhold the records pursuant to the discretion granted to law enforcement agencies by the investigatory records exception.

The KPD relies on Ind. Code § 5-14-3-4(b)(1), the investigatory records exception, as it relates to the requested records. That exception provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is defined as "information compiled in the course of the investigation of a crime." I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations. Moreover, it does not apply only to an investigation where a crime was charged or an investigation where it was adjudicated that a crime was indeed committed. Instead, the exception applies to all records compiled during the course of the investigation of a crime, even where a crime was not ultimately charged, and even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157*. "Generally, a police report or incident report is an investigatory record and as such may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(1)." *Id.* Regardless of whether or not the KPD was the agency responsible for the investigation of Ms. Valentino's husband, nothing in the APRA requires that the agency withholding investigatory records be the same agency that conducted the relevant investigation. If the rule were otherwise, law enforcement agencies would be reluctant to share investigatory records regarding their investigations with other agencies, because the record would lose its confidentiality as soon as another agency obtained it. This does not seem consistent with section 6.5 of the APRA, which provides that "[a] public agency that receives a confidential public record from another agency shall maintain the confidentiality of the public record." I.C. § 5-14-3-6.5.

I see no reason to hold that the KPD has abused its discretion by withholding records in this case. The Indiana Court of Appeals has held that “the decision to deny access [to public records] after allowing others access could be considered an arbitrary and capricious abuse of discretion,” but I am not aware of any other precedent for such a finding. *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2005), *citing* I.C. § 5-14-3-9(f)(2). Nothing before me indicates that the KPD habitually grants the type of request that it denied you.

With respect to your argument that the KPD should release the information required to be released by subsection 5(a) of the APRA, the KPD argues that that subsection is inapplicable because Ms. Valentino was never “arrested or summoned for an offense....” I.C. § 5-14-3-5(a). Although there is some question as to whether or not Ms. Valentino was “arrested or summoned” given the nature of the officers’ alleged treatment of her on July 6th, it is not the role of the public access counselor to resolve factual disputes. In any event, it does not appear that Ms. Valentino was arrested or summoned *for an offense* within the meaning of the subsection, because nothing before me indicates that Ms. Valentino was ever suspected of any crime. Consequently, I agree with the KPD that subsection 5(a) is inapplicable.

Regarding a daily log, subsection 5(c) of the APRA requires the following:

An agency shall maintain a daily log or record that lists suspected crimes, accidents, or complaints, and the following information shall be made available for inspection and copying:

- (1) The time, substance, and location of all complaints or requests for assistance received by the agency.
- (2) The time and nature of the agency's response to all complaints or requests for assistance.
- (3) If the incident involves an alleged crime or infraction:
 - (A) the time, date, and location of occurrence;
 - (B) the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4;
 - (C) the factual circumstances surrounding the incident; and
 - (D) a general description of any injuries, property, or weapons involved.

The information required in this subsection shall be made available for inspection and copying in compliance with this chapter. The record containing the information must be created not later than twenty-four (24) hours after the suspected crime, accident, or complaint has been reported to the agency.

I.C. § 5-14-3-5(c). If an agency does not maintain a separate daily log, the agency must produce some record that contains the information required by I.C. § 5-14-3-5(c) to be disclosed. In some jurisdictions, the law enforcement agency will provide a copy of a police report or incident report if the agency does not maintain a daily log. The agency is only required to provide the information listed in I.C. § 5-14-3-5(c), though, and as such

may redact the remainder of the information contained on the report if it was indeed compiled during the course of the investigation of a crime or is nondisclosable pursuant to another exception.

Based on these standards, the KPD acted within the discretion provided to it by the APRA when it denied your request for investigatory records, but subsection 5(c) of the APRA nevertheless requires the KPD to produce the information listed therein. Subsection 5(c)(3)(C) does not require *all* “factual circumstances surrounding the incident” to be released if such information is contained within investigatory records, but the APRA does require the KPD to fulfill its obligations to make all daily log information available for inspection and copying. The failure of the KPD to release any information under subsection 5(c) is a violation of the APRA.

I note, however, that nothing in subsection 5(c) requires the KPD to release the names of officers who responded to the July 6th incident. Although I understand your client’s desire to obtain that information in conjunction with her lawsuit, I know of no reason why she could not initiate her action based on the information already available. You are correct that the rules of discovery generally afford greater access to information than the APRA, but those rules are separate and distinct from the APRA and have no effect on the application of the APRA or the KPD’s ability to exercise the discretion granted under Ind. Code § 5-14-3-4(b)(1).

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

cc: Lawrence McCormack